

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWN H. KONO,
Appellant,
vs.
WELLS FARGO BANK, N.A.; AND
NATIONAL DEFAULT SERVICING
CORPORATION,
Respondents.

No. 59928

FILED

DEC 17 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a Foreclosure Mediation Program (FMP) matter. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

In an appeal from a district court order granting or denying judicial review in an FMP matter, this court defers to the district court's factual determinations and reviews de novo the district court's legal determinations. *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. ___, ___, 286 P.3d 249, 260 (2012). To obtain an FMP certificate, a deed of trust beneficiary must: (1) attend the mediation; (2) participate in good faith; (3) bring the required documents; and (4) if attending through a representative, have a person present with authority to modify the loan or access to such person. NRS 107.086(4) and (5) (2011); *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. ___, ___, 255 P.3d 1275, 1278-79 (2011).

Appellant first contends that respondent Wells Fargo Bank, N.A., does not own his loan and was therefore not the proper party to attend the mediation. Specifically, appellant argues that because the Mortgage Electronic Registration Systems, Inc. (MERS) assignment produced by Wells Fargo transferred only his deed of trust, but not his promissory note, Wells Fargo lacked authority to enforce the note. This

line of reasoning was rejected by our opinion in *Edelstein*, 128 Nev. at ___, 286 P.3d at 260. In particular, in *Edelstein*, we recognized that when a homeowner's deed of trust contains language appointing MERS as the beneficiary, this constitutes an agreement to separate the note from the deed of trust. 128 Nev. at ___, 286 P.3d at 259. We concluded, however, that such separation is "not irreparable or fatal" so long as both documents "are ultimately held by the same party" at the time that party seeks to foreclose. *Id.* at ___, 286 P.3d at 260.

Such is the case here. In December 2005, appellant signed a deed of trust and a promissory note in which Sierra Financial Mortgage was identified as the lender and MERS was identified as the deed of trust beneficiary. As for the deed of trust, MERS assigned beneficial interest to Wells Fargo via the May 2010 assignment. As for the promissory note, Sierra Financial endorsed the note to the order of Ohio Savings Bank who, in turn, endorsed the note in blank, meaning that the entity in possession of the note was entitled to enforce the note. *Id.* at ___, 286 P.3d at 261 (citing *Leyva*, 127 Nev. at ___, 255 P.3d at 1280). Thus, by demonstrating possession of appellant's original promissory note, deed of trust, and the MERS assignment, Wells Fargo established that it was the entity entitled to enforce appellant's note and to proceed with foreclosure. *Cf. Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. ___, ___, 290 P.3d 249, 254 (2012) (recognizing that the purpose of NRS 107.086's document-production requirements is to identify the entity that is entitled to enforce the note and to foreclose). Accordingly, based on the documents Wells Fargo produced, the district court correctly determined that Wells Fargo

was the proper party to appear at the mediation.¹ *Edelstein*, 128 Nev. at ___, 286 P.3d at 260 (reviewing the district court's legal conclusions de novo).

Appellant next contends that the assignment produced by Wells Fargo was "void" because it did not recite the amount of consideration that Wells Fargo paid for the assignment. According to appellant, this failure to recite the consideration paid violates NRS 111.210. We disagree. NRS 111.210, part of Nevada's statute of frauds, applies to "contract[s] . . . for the sale of . . . an[] interest in lands." NRS 111.210(1). A written assignment of a deed of trust, however, is not a contract, but is an instrument that sets forth the chain of title. A written assignment is therefore akin to a receipt, providing a written record of who is entitled to foreclose on secured property as a means of satisfying a borrower's obligation under a promissory note. *Cf. Einhorn*, 128 Nev. at ___, 290 P.3d at 254 (indicating that an assignment's purpose is to complete the chain of title of the person seeking to enforce the note and to proceed with foreclosure). Thus, while a signed writing is required to transfer the beneficial interest in a deed of trust, *see* NRS 111.205, this

¹Appellant also argues that Wells Fargo did not own his loan because a printout from MERS' website indicated that Wells Fargo was merely the servicer and that a different entity, Fannie Mae, was the "investor." While this printout may suggest as much, based on the documents presented by Wells Fargo, it was not clearly erroneous for the district court to conclude that Wells Fargo owned appellant's loan. *Edelstein*, 128 Nev. at ___, 286 P.3d at 260 (indicating that, absent clear error, this court will not overturn a district court's factual determinations). We further note that the appropriate time for appellant to bring the July 2011 MERS printout to the parties' attention would have been at the August 2011 mediation so that the mediator could document appellant's concerns in the mediator's statement.

writing does not need to recite consideration to accomplish its purpose. See *Leyva*, 127 Nev. at ___, 255 P.3d at 1279 (discussing the applicability of NRS 111.205 without reference to NRS 111.210). Accordingly, the district court properly determined that the deed of trust assignment produced by Wells Fargo was not "void" for failure to comply with NRS 111.210(1). *Edelstein*, 128 Nev. at ___, 286 P.3d at 260.

Appellant finally contends that Wells Fargo mediated in bad faith by refusing to disclose the amount it paid to acquire ownership of appellant's loan while still asserting its right to seek a deficiency judgment. Nothing in the FMP statute or rules requires disclosure of this information, and the district court did not clearly err in finding a lack of bad faith in this regard. *Edelstein*, 128 Nev. at ___, 286 P.3d at 260 (indicating that, absent clear error, a district court's factual determinations will not be disturbed). Accordingly, we

ORDER the judgment of the district court AFFIRMED.²

Pickering, C.J.
Pickering

Hardesty, J.
Hardesty

Cherry, J.
Cherry

²Appellant's argument regarding deficient document certifications is meritless and does not warrant discussion.

cc: Hon. Patrick Flanagan, District Judge
Mark L. Mausert
Tiffany & Bosco, P. A.
Washoe District Court Clerk